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In the Supreme Court of the United States

OCTOBER TERM, 1958

WINNEBAGO TELIVISION CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 22–23) is reported at 258 F. 2d 163. The decision of the Federal Communications Commission (R. 792–802) is reported at 22 F. C. C. 356, and its order denying rehearing (R. 869–873) at 23 F. C. C. 53.

JURISDICTION

The judgment of the court of appeals affirming the orders of the Commission was entered on July 2, 1958. By order of the Chief Justice dated September 19, 1958, the time for filing a petition for certiorari was extended to November 14, 1958. The petition for

a writ of certiorari was filed on November 14, 1958. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1) and 47 U. S. C. 402 (j).

QUESTIONS PRESENTED

1. Whether the Commission's decision not to change its 1952 television channel assignments in Madison, Wisconsin, and Rockford, Illinois, is based on adequate findings and conclusions.

2. Whether the validity of the Commission's orders is affected by its rulings in other channel reallocation proceedings or by the action of this Court in *Sangamon Valley Television Corporation* v. *United States*, and *WIRL Television Company* v. *United States*, Nos. 235 and 242, this Term.

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934, 47 U. S. C. 151, *et seq.*, are set forth in the petition (p. 3).

STATEMENT

The Federal Communications Commission on March 1, 1957, after full rule-making proceedings initiated on its own motion,[1] declined to amend Section 3.606 of its Rules (47 C. F. R. 3.606), comprising a nationwide allocation of television channels, by reassigning the only VHF channel (Channel 3) in Madison, Wisconsin, from commercial to educational use or, alternatively, transferring the channel to Rockford, Illi-

[1] The background which led the Commission to institute the proceeding is set forth in the Government's brief in opposition in *Springfield Television Broadcasting Corporation* v. *United States*, No. 516, this Term, pending on petition for a writ of certiorari.

nois, 55 miles south of Madison, as a second VHF commercial channel (R. 792–802). The Commission found that large numbers of persons in rough terrain areas to the north and west of Madison would lack any commercial television service if either proposal was adopted (R. 793, 795–797, 872). In addition, the Commission found that reserving Channel 3 for educational use in Madison would entail a grave risk of terminating all educational television there, since educational groups—presently operating inexpensively on a UHF channel—lacked and were unlikely to obtain the public funds necessary to convert to VHF transmitting equipment (R. 793, 798). The Commission further found that the alternative of transferring the channel to nearby Rockford would not free the Madison area from VHF competition, and might cause the situation to worsen since a new station on Channel 3 at Rockford would still provide a strong signal over Madison and might stimulate the existing low power Rockford VHF station to increase its service area, thus providing a second strong VHF signal over Madison (R. 796–797, 798).[2] The Commission accordingly concluded that both proposals for the reassignment of Channel 3 were contrary to the public interest (R. 793, 798) and reaffirmed its decision on reconsideration on June 26, 1957 (R. 869–873).

[2] The Commission also considered a proposal by petitioner that the transmitter of a station operating on Channel 3 in Champaign, Illinois, be relocated to permit a Rockford Channel 3 assignment which would not cover Madison, but rejected the proposal upon the ground that it would increase the area southwest of Madison which would lack any service (R. 798, 872, n. 1).

Petitioner, the licensee of a UHF channel serving the Rockford area, participated in the rule making proceeding and sought judicial review of the Commission's decisions, from which the Madison UHF stations did not appeal.

On appeal, the court below affirmed the Commission's orders in a *per curiam* opinion. The court, citing *Coastal Bend Television Co.* v. *F. C. C.*, 234 F. 2d 686 (C. A. D. C.); *WIRL Television Co.* v. *F. C. C.*, 253 F. 2d 863 (C. A. D. C.); and *Springfield Television Broadcasting Corp.* v. *F. C. C.*, 259 F. 2d 170 (C. A. D. C.), petition for writ of certiorari pending, No. 516, this Term (*supra*, p. 2), said (Pet. App. 23):

> After consideration of the record in light of petitioner's contentions, we find no basis for disturbing the Commission's action.

ARGUMENT

1. The basis of petitioners' contention that the decision below contravenes Congressional policy embodied in the Communications Act (Pet. 12–16) is that the Commission did not adequately set forth the grounds for its decision. But we submit that these grounds, which we have previously summarized (*supra*, p. 3), are not only clearly set forth but also fully support the conclusion that a change in the existing assignment of Channel 3 to Madison would not serve the best interests of the listening and viewing public. Petitioners show at most that a court, if empowered to determine this issue initially or to make a *de novo* determination, might conceivably reach a conclusion different from that of the Commission. But a court reviewing an

order of the Commission has a much more limited function and power. See Government's brief in opposition in No. 516, at page 9. We submit, therefore, that petitioners' contention raises no question of substance.

2. Petitioners' contention that the Commission's decision is invalidated by reason of its rulings against deintermixture in certain other proceedings, or by reason of the fact that one of the majority Commissioners in the present case had dissented from the foregoing rulings (Pet. 10–12, 17–19), renew the same contentions made in No. 516. We therefore refer to the Government's answer to these contentions in its brief in opposition in that case (pp. 9–10). In connection with the latter contention, we point out that here, as in No. 516, the Commission's comprehensive reports (R. 792–800, 869–872) dealt solely with the question of whether a change in the Channel 3 assignment to Madison would or would not be in the public interest, and nowhere even remotely suggested that lack of statutory authority was a factor in the decision not to deintermix.

3. Petitioners' final contention (Pet. 20–21) is that the decision below should be vacated and the case remanded to the court of appeals because of the action of this Court in *Sangamon Valley Television Corp.* v. *United States* and *WIRL Television Co.* v. *United States*, Nos. 235 and 242, this Term. But the Commission's decision here to adhere to the *status quo* in Madison does not rest in any respect upon the decisions in favor of deintermixture rendered in those cases. In addition, we are aware of no subsequent

testimony before a Congressional Committee or other development to indicate that any *ex parte* representation was made to any Commissioner on the merits of the instant rule-making proceeding—the basis for the orders entered by this Court in *Sangamon* and *WIRL*. We submit that, in these circumstances, petitioners show no basis for vacating the judgment of the court below.

CONCLUSION

The decision below is correct, no important issue calling for further review by this Court is presented, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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